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No. 07-1555

In the Supreme Court of the United States

GERMAR SCHEERER, AKA GERMAR RUDOLF,
PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Board of Immigration Appeals abused its discretion in denying petitioner's motion to reopen his removal proceedings in order to facilitate petitioner's attempt to adjust his status to that of a lawful permanent resident, in light of a regulation that vests exclusive authority to consider applications for adjustment of status filed by arriving aliens in certain officials in the Department of Homeland Security.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 513 F.3d 1244. The decisions of the Board of Immigration Appeals that are the subject of the current petitions for judicial review (C.A. R.E., Vol. II, tab 10 and C.A. R.E., Vol. II, tab 13, at 7-8, respectively) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 2008. On March 26, 2008, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including June 13, 2008, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Legal immigration into the United States is controlled by the issuance of immigrant visas abroad by consular officers acting under the authority of the Secretary of State. See 8 U.S.C. 1154(b), 1201(a). Congress has also authorized the Attorney General and the Secretary of Homeland Security to relieve certain qualifying aliens who are already in the United States of the need to depart and obtain an immigrant visa through consular processing by adjusting their status to that of a lawful permanent resident. See 8 U.S.C. 1255(a); *Randall* v. *Meese*, 854 F.2d 472, 473-474 (D.C. Cir. 1988) (R.B. Ginsburg, J.), cert. denied, 491 U.S. 904 (1989). Adjustment of status is discretionary and is "a matter of grace, not of right." *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978).

2. a. Petitioner is a native and citizen of Germany. Pet. App. 3a. In 1995, petitioner fled Germany after being convicted of inciting racial hatred in violation of German law, and he eventually traveled to the United States. *Ibid.* On August 9, 2000, petitioner was granted immigration parole,[1] and he subsequently filed applications for asylum and withholding of removal. *Id.* at 3a-4a. On April 2, 2001, the former Immigration and Naturalization Service issued a Notice to Appear, charging that petitioner was an inadmissible arriving alien who

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[1] 8 U.S.C. 1182(d)(5)(A) confers authority to parole from immigration custody "any alien applying for admission" who would otherwise be detained until the question of admissibility is resolved. Immigration parole is "simply a device through which needless confinement is avoided while administrative proceedings are conducted"; a paroled alien is "still in theory of law at the boundary line." *Leng May Ma* v. *Barber*, 357 U.S. 185, 189, 190 (1958) (quoting *Kaplan* v. *Tod*, 267 U.S. 228, 230 (1925)).

had failed to depart from the United States within the 90-day period for which he had been granted immigration parole. A.R. 2864.

b. On June, 2003, an immigration judge (IJ) issued a decision and order concluding that petitioner was properly categorized as an arriving alien and that he was inadmissible to the United States. C.A. R.E., Vol. I, tab 1, at 428-429; see 8 C.F.R. 1.1(q) (defining "arriving alien" as including "an applicant for admission coming or attempting to come into the United States at a port-of-entry," even if that person has been granted immigration parole). The IJ denied petitioner's applications for asylum and withholding of removal, and it made a specific finding that petitioner's application for asylum had been "frivolous." C.A. R.E., Vol. I, tab 1, at 424. See 8 U.S.C. 1158(d)(6) (providing that an alien who knowingly files a frivolous application for asylum after being warned of the consequences of doing so "shall be permanently ineligible for any" immigration benefits). The IJ also denied petitioner's request for voluntary departure, and ordered him removed to Germany. C.A. R.E., Vol. I, tab 1, at 424.

On November 8, 2004, the Board of Immigration Appeals (BIA or Board) issued an order that affirmed the IJ's June 3, 2003, decision without opinion. Pet. App. 26a-27a.

c. On December 7, 2004, petitioner filed with the BIA a motion to reopen his removal proceedings and to remand his case to the IJ in order to permit him to apply for adjustment of status. C.A. R.E., Vol. I, tab 3. In that motion, petitioner asserted that he had married a United States citizen on September 11, 2004, nearly two months before the BIA's November 8, 2004, decision. *Id.* at 2. Petitioner further asserted that, on December

6, 2004, his United States citizen spouse had filed an immediate relative (I-130) visa petition on his behalf with the United States Citizenship and Immigration Service (USCIS) in the Department of Homeland Security (DHS). *Ibid.*[2] Petitioner acknowledged that the IJ had specifically concluded that his asylum application had been frivolous and that this finding would ordinarily render him ineligible for adjustment of status, *id.* at 3, but he argued that the IJ had failed to comply with the regulations that govern the making of such a finding, *id.* at 3-4. As relief, petitioner asked the Board to "remand this case to the Immigration Court with instructions" to give him an opportunity to contest the IJ's frivolousness finding "and subsequently adjudicate his application for adjustment of status." *Id.* at 4.

On March 3, 2005, the BIA denied petitioner's motion to reopen its November 8, 2004, decision. Pet. App. 24a-25a. The Board cited (*id.* at 24a) former 8 C.F.R. 1245.1(c)(8) (2005), which provided that "[a]ny arriving alien who is in removal proceedings" was "ineligible to apply for adjustment of status."

d. Petitioner filed timely petitions for review with respect to the BIA's November 8, 2004, and March 3, 2005, decisions, which the court of appeals consolidated. In November 2005, petitioner was removed to Germany after the court of appeals and this Court denied motions to stay enforcement of his removal order. Pet. App. 4a.[3]

e. On April 13, 2006, the court of appeals granted the petitions for review in part and denied them in part.

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[2] We have been advised by DHS that the I-130 petition filed by petitioner's wife was approved on October 19, 2005.

[3] We have been advised by DHS that German officials have advised that petitioner is currently incarcerated in Germany for violations of German law and is expected to be released in July 2009.

Scheerer v. *United States Att'y Gen.*, 445 F.3d 1311 (11th Cir. 2006) (*Scheerer I*). The court affirmed the denial of petitioner's claims for asylum and withholding of removal. *Id.* at 1317. The court vacated the finding that petitioner's application for asylum had been frivolous, concluding that the IJ's determinations about "the legal insufficiency of [petitioner's] claim and an adverse credibility determination * * * were insufficient to support a finding of frivolousness." *Id.* at 1318; see *ibid.* (stating that, in order to deem an application for asylum frivolous within the meaning of the relevant statute, an IJ must "specifically find material elements of [the] asylum application were deliberately fabricated"); 8 C.F.R. 208.20.

Finally, the court of appeals determined that former 8 C.F.R. 1245.1(c)(8) (2005)—the provision that made arriving aliens who were in removal proceedings categorically ineligible for adjustment of status—was "invalid because it conflicts with congressional intent as expressed in the governing statute, 8 U.S.C. § 1255(a)." *Scheerer I*, 445 F.3d at 1318; see *id.* at 1318-1322. The court of appeals remanded the matter to the BIA for further proceedings "consistent with this opinion." *Id.* at 1322.

3. *Scheerer I* was one of a number of conflicting court of appeals decisions about the validity of former 8 C.F.R. 1245.1(c)(8) (2005).[4] On May 8, 2006, the At-

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[4] Compare *Succar* v. *Ashcroft*, 394 F.3d 8, 36 (1st Cir. 2005) (concluding that the regulation was invalid), *Zheng* v. *Gonzales*, 422 F.3d 98, 119-120 (3d Cir. 2005) (same), and *Bona* v. *Gonzales*, 425 F.3d 663, 668-670 (9th Cir. 2005) (same), with *Momin* v. *Gonzales*, 447 F.3d 447, 459-461 (5th Cir.) (upholding the regulation), opinion vacated, 462 F.3d 497 (5th Cir. 2006), and *Mouelle* v. *Gonzales*, 416 F.3d 923, 930 (8th Cir. 2005) (same), cert. granted and judgment vacated, 548 U.S. 901 (2006).

torney General and the Secretary of Homeland Security (Secretary) promulgated an interim rule with request for comments (Interim Rule) in order to address that conflict. See 71 Fed. Reg. 27,587 (2006). The Interim Rule repealed former 8 C.F.R. 1245.1(c)(8) (2005). See 71 Fed. Reg. at 27,591. In its place, the Interim Rule promulgated 8 C.F.R. 245 2(a)(1), which provides that USCIS has exclusive "jurisdiction to adjudicate an application for adjustment of status filed by any alien, unless the immigration judge has jurisdiction to adjudicate the application under 8 C.F.R. 1245.2(a)(1)." See 71 Fed. Reg. at 27,591.

The Interim Rule also promulgated 8 C.F.R. 1245(a)(1)(ii), which governs applications for adjustment of status filed by "an arriving alien who is placed in removal proceedings." 8 C.F.R. 1245(a)(1)(ii); see 71 Fed. Reg. at 27,591. Subject to "only one narrow exception * * * for an alien who leaves the United States while an adjustment application is pending with USCIS, and then returns under a grant of advance parole," *id.* at 27,587-27,588, that provision provides that "the immigration judge does not have jurisdiction to adjudicate any application for adjustment of status" filed by an arriving alien who is in removal proceedings, 8 C.F.R. 1245.2(a)(1)(ii); see 8 C.F.R. 1245.2(a)(1)(ii)(A)-(D); 71 Fed. Reg. at 27,587-27,588 (describing this rule as "consistent with current practice, under longstanding regulations limiting the jurisdiction of the immigration judges in this context").[5] Finally, the Interim Rule pro-

[5] In contrast, 8 C.F.R. 1245.2(a)(1)(i)—which was also adopted as part of the Interim Rule, see 71 Fed. Reg. at 27,591—provides that an IJ "has exclusive jurisdiction to adjudicate any application for adjustment of status" filed by "any alien who has been placed in deportation

vides that it is "applicable to all cases pending administrative or judicial review on or after May 12, 2006." *Id.* at 27,588.

4. a. On July 26, 2006, the BIA issued its decision on remand from the court of appeals. The Board noted that petitioner "is an arriving alien who does not come within the narrow exception" to the Interim Rule's general rule that USCIS has exclusive jurisdiction to consider applications for adjustment of status by arriving aliens. C.A. R.E., Vol. II, tab 10, at 2. Accordingly, the BIA concluded that petitioner "must pursue any application for adjustment of status with [USCIS], independent of these removal proceedings," and it denied his "motion to reopen to apply for adjustment of status before the Immigration Judge." *Ibid.*

b. Petitioner filed a motion for reconsideration of the Board's July 26, 2006, decision. C.A. R.E., Vol. II, tab 12. In that motion, petitioner argued that the BIA's renewed denial of his motion to reopen was inconsistent with the remand order from the court of appeals. *Id.* at 2. Petitioner also asserted that application of the Interim Rule to his case had "a perverse effect" because, as a consequence of his removal to Germany and his resulting inadmissibility, "he will not be able to reenter the United States * * * to take advantage of the new regulation." *Id.* at 2-3; see 8 U.S.C. 1182(a)(9)(A)(i) and (ii) (prescribing various periods of inadmissibility for aliens previously ordered removed from the United States). Petitioner also argued that "DHS must allow [him] back into the United States to pursue his adjust-

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proceedings or in removal proceedings (other than as an arriving alien)."

ment of status application." C.A. R.E., Vol. II, tab 12, at 3.

On November 2, 2006, the BIA issued an order denying petitioner's motion for reconsideration. C.A. R.E., Vol. II, tab 13, at 7-8. The Board observed that the procedures established by the Interim Rule "are clearly applicable to this case," *id.* at 7, and it stated that it had "no authority to order DHS to allow [petitioner's] return to the United States," *id.* at 8.[6]

5. Petitioner filed new petitions for review with respect to the BIA's July 26, 2006, and November, 2, 2006, decisions, which the court of appeals consolidated. On January 15, 2008, the court of appeals issued the decision that is at issue in this petition for a writ of certiorari and denied both petitions for review. Pet. App. 1a-21a.

The court of appeals' analysis had three parts. First, the court of appeals concluded that the Interim Rule is valid under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). The court concluded that "the 'precise question at issue' is different" than in *Sheerer I*, because the Interim Rule "does not alter the eligibility standards governing adjustment applications," but rather "removes a category of applications from the jurisdiction of the immigration courts, leaving those applications to be adjudicated by USCIS." Pet. App. 11a. The court determined that the governing statutory provisions are silent with respect to the permissibility of such an approach, *id.* at 11a-12a, and that the regulation "appears fully consis-

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[6] We have been advised by DHS that petitioner filed an application for adjustment of status with USCIS on February 21, 2008. But see 8 U.S.C. 1255(a) (stating that an alien must be in the United States in order to obtain lawful permanent resident status by way of an application for adjustment of status); 8 C.F.R. 245.1(a) (same).

tent with the broader statutory framework governing adjustment applications, in which Congress has divided adjudication functions between [the Department of Justice] and DHS and has authorized those departments to fill the gaps as to specific application procedures, *id.* at 13a-14a.

Second, the court of appeals concluded that the application of the Interim Rule to petitioner's case neither had a constitutionally impermissible retroactive effect, Pet. App. 15a-16a, nor violated its mandate in *Scheerer I*, *id.* at 17a-18a. The court noted that although its previous decision "established that [petitioner] could not be declared ineligible for adjustment of status based on the 'mere fact of removal proceedings,' it did not create any requirement that his adjustment application be adjudicated by an immigration court" rather than USCIS. *Id.* at 18a (citation omitted).

Third, the court of appeals held that the BIA had not abused its discretion in denying petitioner's motion to reopen his removal proceedings. Pet. App. 18a-20a. The court acknowledged that several of its own decisions had "found an abuse of discretion in the denial of a continuance during the pendency of a visa petition where the alien was seeking adjustment of status," and that the BIA had previously held "that, when certain five factors are met, a motion to reopen may be granted to provide an alien the opportunity to pursue an adjustment application based on a marriage entered into after the commencement of [removal] proceedings." *Id.* at 18a-19a (citing, *inter alia*, *In re Velarde-Pacheco*, 23 I. & N. Dec. 253 (B.I.A. 2002)). But the court explained that the aliens in those cases "were not arriving aliens and thus were subject to a different regulatory framework than that which governs here." *Id.* at 19a. The court of ap-

peals stated that, in the category of cases at issue in the previous decisions, "an IJ would have authority to adjudicate the petitioners' respective applications once the statutory prerequisites to adjustment of status were satisfied." *Ibid.* Cf. 8 C.F.R. 1245.2(a)(1)(i) (providing that IJs have "exclusive jurisdiction to adjudicate any application for adjustment of status" filed by "any alien who has been placed in deportation proceedings or in removal proceedings (other than as an arriving alien)"). Here, in contrast, under the Interim Rule, "the immigration courts have no jurisdiction over adjustment applications filed by aliens in [petitioner's] position," and petitioner's application for adjustment of status "would never return to the immigration courts even if denied by USCIS." Pet. App. 19a.

The court of appeals also rejected petitioner's contention that the BIA's refusal to reopen his removal proceedings conflicted "with the intent of the [Interim Rule] as reflected in [the Department of Justice's] published implementation procedures." Pet. App. 19a-20a. A portion of the explanatory text that accompanied the Interim Rule states that previous BIA decisions had recognized that "it will ordinarily be appropriate for an immigration judge to exercise his or her discretion favorably to grant a continuance or motion to reopen in the case of an alien who has submitted a prima facie approvable visa petition and adjustment application in the course of a deportation hearing." 71 Fed. Reg. at 27,589. The court of appeals concluded, however, that that statement "merely reiterates the principles set forth in *Velarde-Pacheco* and similar cases" and "cannot fairly be read to establish a policy requiring the reopening of proceedings even where, as here, there is no possibility that the alien's adjustment application would be adjudi-

cated during those proceedings." Pet. App. 20a. Accordingly, the court of appeals concluded that the BIA's reliance on the Interim Rule in denying petitioner's motion to reopen his removal proceedings "reflects a reasonable interpretation of that regulation, which was intended to clarify that applications such as [petitioner's] 'will be adjudicated *only* by [USCIS].'" *Ibid.* (quoting 71 Fed. Reg. at 27,587) (emphasis added).[7]

ARGUMENT

The issue presented by this petition for a writ of certiorari is a narrow one. Petitioner expressly states (Pet. 6 n.4) that he is no longer challenging the validity of the Interim Rule, including the portion of the Interim Rule that provides that applications for adjustment of status filed by arriving aliens generally fall within the exclusive jurisdiction of USCIS. The petition for a writ of certiorari likewise does not challenge: (i) the BIA's conclusion that petitioner was properly classified as an arriving alien at the time he filed his motion to reopen his removal proceedings; (ii) the court of appeals' conclusion that the procedures set forth in the Interim Rule may validly be applied to petitioner's case; or (iii) the BIA's denial of petitioner's motion to reconsider its previous denial of his motion to reopen. Petitioner likewise does not contend that the BIA failed to give an adequate *explanation* of its decision to deny his motion to reopen.

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[7] The court of appeals also emphasized that, "[i]n view of the highly unusual circumstances of this case," "there may be avenues of relief still available" to petitioner. Pet. App. 20a n.10. The court noted that the government had stated in its brief that DHS was willing "to 'take steps that would permit [petitioner] to apply for adjustment of status within the applicable regulatory framework,'" and it identified two methods through which petitioner might be able to do so. *Ibid.*

Instead, the sole issue of which petitioner seeks this Court's review is whether—assuming the validity of the Interim Rule—the BIA "abuse[d] its discretion as a matter of law" in denying his motion to reopen. Pet. i, see Pet. 1, 6-17.

Further review of that question is not warranted. The court of appeals' decision is correct. There is no clear conflict among the court of appeals over the specific question presented here, and, even if there were such a conflict, it would be narrow and recently arising and might well be resolved without this Court's intervention. Finally, this case would be a poor vehicle in which to consider the issue upon which petitioner seeks review.

1. The court of appeals correctly held that the BIA did not abuse its discretion in denying petitioner's motion to reopen his removal proceedings. The purpose of a motion to reopen is to present "new facts" that may bear on an alien's eligibility for relief. 8 U.S.C. 1229a(c)(7)(B). "The decision to grant or deny a motion to reopen * * * is within the discretion of the Board," 8 C.F.R. 1003.2(a), and this Court has recognized that "[t]here are at least three independent grounds on which the BIA may deny a motion to reopen." *INS* v. *Abudu*, 485 U.S. 94, 104 (1988). First, the Board may deny reopening if it concludes that "the movant has not established a prima facie case for the underlying substantive relief sought." *Ibid.* "Second, the BIA may hold that the movant has not introduced previously unavailable, material evidence." *Ibid.* And third, "in cases in which the ultimate grant of relief is discretionary"—including adjustment of status—"the BIA may leap ahead, as it were, over the two threshold concerns * * *, and simply determine that even if they were met,

the movant would not be entitled to the discretionary grant of relief." *Id.* at 105.

In this case, the BIA correctly denied reopening on the ground that petitioner "ha[d] not established a prima facie case for the underlying substantive relief sought." *Abudu*, 485 U.S. at 104. In his motion to reopen, petitioner asked the BIA to "remand this case to the Immigration Court with instructions to * * * adjudicate his application for adjustment of status." C.A. R.E., Vol. I, tab 3, at 4. The BIA construed petitioner's motion in accordance with its terms, twice stating that petitioner had requested reopening "to apply for adjustment of status before the Immigration Judge." C.A. R.E., Vol. II, tab 10, at 1-2. But as the Board noted (*id.* at 2), the Interim Rule makes clear that IJs lack authority to adjudicate applications for adjustment of status filed by aliens in petitioner's position. See 8 C.F.R. 1245.2(a)(1)(ii). The IJ's conceded inability to grant the only form of "substantive relief sought" in petitioner's motion to reopen, *Abudu*, 485 U.S. at 104, provided more than sufficient reason for the BIA to deny that motion.

The court of appeals correctly rejected petitioner's contrary arguments. As the court explained (Pet. App. 18a-19a), certain other categories of aliens may—indeed, must—pursue any application for adjustment of status before an IJ as part of their removal proceedings. See 8 C.F.R. 1245.2(a)(1)(i). Accordingly, for those aliens, an otherwise proper motion to reopen may be a necessary prerequisite to permit them to pursue that form of "substantive relief" before an IJ. *Abudu*, 485 U.S. at 104. In contrast, under the Interim Rule, an arriving alien must seek adjustment of status from USCIS, and the court of appeals correctly noted that any such appli-

cation "would never return to the immigration courts *even if denied by USCIS*." Pet. App. 19a (emphasis added). Because any application for adjustment of status that petitioner might have filed with USCIS would be entirely "independent of [petitioner's] removal proceedings," C.A. R.E., Vol. II, tab 10, at 1-2, the mere prospect that petitioner might file such an application in the future did not require the BIA to reopen his removal proceedings. See note 6, *supra* (explaining that petitioner did not file an application for adjustment of status until 2008).

Petitioner errs in contending (Pet. 11-12) that the approach followed by the BIA in this case is inconsistent with the explanatory text that accompanied the Interim Rule. The statements that petitioner identifies are contained in a section that solicits public comments about further possible changes to the regulations. In that section, the Secretary and the Attorney General state that they "are interested in receiving public comment on whether the regulations should be amended to provide additional regulatory guidance" about the circumstances under which IJs and the BIA "should exercise discretion to grant or deny a continuance for arriving aliens in removal proceedings who have filed an application for adjustment of status which remains pending with USCIS." 71 Fed. Reg. 27,589 (2006). The next sentence observes that the BIA has stated that, under existing law, "it will ordinarily be appropriate for an [IJ] to exercise his or her discretion favorably to grant a continuance or motion to reopen in the case of an alien who has submitted a prima facie approvable visa petition and adjustment application in the course of a deportation hearing." *Ibid.* After further clarifying the request for comments, the explanatory text also states that, "[i]n the meantime,

USCIS, the immigration judges, and the BIA will continue to apply the discretionary factors in accordance with the general principles noted above, and guided by prior decisions." *Id.* at 27,590.

As the court of appeals correctly explained (Pet. App. 20a), the comments quoted above, which simply describe pre-existing law, "cannot fairly be read to establish a policy requiring the reopening of proceedings even where, as here, there is no possibility that the alien's adjustment application would be adjudicated during those proceedings." Rather, those comments "merely reiterate[] the principle set forth in" previous BIA and court of appeals decisions regarding the circumstances in which IJs or the BIA should grant continuances or reopening in order to permit an alien to pursue an application for adjustment of status *before the IJ*. *Ibid.* Courts "are properly hesitant to" disregard an agency's understanding of its own regulations unless an "alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation." *Gardebring* v. *Jenkins*, 485 U.S. 415, 430 (1988). Petitioner does not come close to meeting those standards.

Petitioner also errs in asserting (Pet. 13) that the decisions of the BIA and the court of appeals in this case will "effectively preclude[]" an arriving alien from obtaining "an adjudication of" an application for adjustment of status. As the court of appeals observed (Pet. App. 13a n.7), petitioner has offered "no empirical support for his contention that the [framework established by the Interim Rule] bars 'virtually all' paroled aliens from pursuing the merits of their adjustment application." Nor do the facts of this case support such an assertion. At the time of his September 11, 2004, mar-

riage, petitioner had already been in the United States for nearly three-and-a-half years. Although an IJ had already ordered petitioner removed at the time of their wedding, petitioner's spouse did not file an application for an immediate relative visa until December 2004, nearly three months later. Petitioner was not ultimately removed until November 2005, and he was removed only after both the court of appeals and this Court denied his requests for a stay of removal. Petitioner does not assert that he asked USCIS to expedite consideration of his visa petition in light of his pending immigration proceedings, nor does he assert that he requested a stay of removal from DHS in order to give the agency more time to consider that application and any subsequent request for adjustment of status. See 8 C.F.R. 241.6(a) (authorizing certain DHS officials to "grant a stay of removal or deportation for such time and under such conditions as [they] may deem appropriate").

2. Petitioner contends (Pet. 14-17; Pet. Supp. Br. 1-2) that the court of appeals' decision in this case conflicts with decisions of the Second, Seventh, and Ninth Circuits. There is no ripe conflict with respect to the specific question presented here, and, even if there were such a conflict, it would be narrow and recently arising and may well be resolved without this Court's intervention.

There is no conflict between the decision below and *Sheng Gao Ni* v. *BIA*, 520 F.3d 125 (2d Cir. 2008). In *Sheng Gao Ni*, the Second Circuit concluded that the BIA had failed to "provide a rational explanation for" its decision to deny several arriving aliens' motions to reopen their removal proceedings in order to permit them to pursue applications for adjustment of status, *id.* at 130 (internal quotation marks and citation omitted), and

it "remand[ed] the[] cases to the BIA for reconsideration of whether [the aliens'] motions to reopen warrant a favorable exercise of the BIA's discretion," *id.* at 131. Petitioner's claim, however, is not that the BIA failed to provide an adequate explanation for his decision. Rather, petitioner asserts that the Board "abuse[d] its discretion as a matter of law" (Pet. i; see Pet. 1) in denying his motion to reopen. The Second Circuit did not decide that question in *Sheng Gao Ni*. Indeed, it specifically referred to the Eleventh Circuit's decision in this case and stated that it "need not decide today" whether the Eleventh Circuit's decision properly "captures the equities of the circumstances in which [the aliens in *Sheng Gao Ni*] and those similarly situated find themselves." 520 F.3d at 131.

Sheng Gao Ni is distinguishable for another reason as well. In that case, the Second Circuit "f[ou]nd no reason for the BIA to have assumed * * * that [the aliens in that case] intended to press their applications [for adjustment of status] in removal proceedings [before IJs], rather than before the USCIS, the forum designated by the" Interim Rule. 520 F.3d at 130. Here, in contrast, petitioner's motion to reopen clearly asked the BIA to "remand this case to the Immigration Court with instructions to * * * *adjudicate* his application for adjustment of status." C.A. R.E., Vol. I, tab 3, at 4 (emphasis added). Although petitioner has now attempted to recast his motion as seeking to have the IJ grant a "continuance" to permit him to pursue an application for adjustment of status with USCIS (Pet. i), that is simply not what petitioner said in his motion to reopen—or in any other document filed with the BIA before it denied petitioner's motion to reopen—and it is not what the BIA understood petitioner to be requesting when it is-

sued its July 26, 2006, decision. See C.A. R.E., Vol. II, tab 10, at 1-2 (BIA twice stating that petitioner had requested reopening "to apply for adjustment of status before the Immigration Judge").[8]

There is likewise no direct conflict between the decision below and *Ceta* v. *Mukasey*, No. 07-1863, 2008 WL 2854153 (7th Cir. 2008). The issue in *Ceta* was whether the BIA had erred in relying on the Interim Rule in affirming an IJ's denial of an alien's motion to continue his removal proceedings. See *id.* at *3-*4. The Seventh Circuit's holding was that "the BIA did not articulate a reason for denying [the alien's] motion for a continuance that was consistent with the adjustment statute," because it had "failed to address th[e] critical point" that the alien "needed more time to pursue his application" for adjustment of status with USCIS. *Id.* at *7. But, again, petitioner's claim is not that the BIA provided an *inadequate explanation* for its decision to deny his motion for reopen; petitioner's assertion is that the Board "abuse[d] its discretion as a matter of law" in doing so. Pet. i. In addition, the issue of whether to defer resolution of a still-ongoing proceeding in light of pending developments in another forum (the *Ceta* situation) is simply not the same as whether a tribunal that has already rendered a final decision should reopen its own proceedings in order to facilitate the losing party's efforts to

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[8] Even in his brief to the court of appeals, petitioner made clear that he envisioned some role for the IJ with respect to his application for adjustment of status. See Pet. C.A. Br. 22-23 ("Once [petitioner's] motion to reopen is properly granted, his application can then be heard by the IJ, or the IJ can transfer jurisdiction to the USCIS to review the application if the IJ so decides.").

obtain a form of relief that falls within the exclusive competence of another tribunal, which is the issue here.

The final decision with which petitioner asserts a conflict is *Kalilu* v. *Mukasey*, 516 F.3d 777 (9th Cir. 2008) (per curiam). *Kalilu* involved consolidated petitions for review in which an alien challenged both (i) an initial decision in which the BIA denied his applications for asylum and withholding of removal and found that he had filed an frivolous asylum application; and (ii) a subsequent decision in which the Board denied a motion to reopen. *Id.* at 778. The Ninth Circuit first determined that it was appropriate to remand the frivolous-asylum-application issue in order to permit the BIA to apply the standards set forth in its intervening decision in *In re Y–L–*, 24 I. & N. Dec. 151 (B.I.A. 2007). See 516 F.3d at 779. The court of appeals acknowledged "that, if on remand, the BIA determines that [the alien] filed a frivolous asylum application, this determination would preclude [the alien] from eligibility to adjust his status"—the only form of substantive relief that the alien had indicated an intent to pursue by way of a motion to reopen. *Id.* at 780 n.3. But the panel nonetheless then went on to conclude that the BIA had abused its discretion in relying on the Interim Rule in denying the alien's motion to reopen. *Id.* at 779-780. In reaching that conclusion, the Ninth Circuit reasoned that an arriving alien's opportunity to apply for adjustment of status with USCIS "is rendered worthless where the BIA * * * denies a motion to reopen (or continuance) that is sought in order to provide time for USCIS to adjudicate a pending application." *Id.* at 780. But see pp. 15-16, *supra* (explaining why that assertion is not correct).

There are at least four reasons why any tension between *Kalilu* and the court of appeals' decision in this

case does not warrant this Court's review at this time. First, there is the factual point that petitioner did not ask the BIA to grant his motion to reopen "in order to provide time for USCIS to adjudicate a pending application" for adjustment of status. *Kalilu*, 516 F.3d at 780; see p. 13, *supra*. Second, the statements in *Kalilu* on which petitioner relies were at least arguably dicta, because the Ninth Circuit panel itself recognized that the issue of whether the BIA had cited a valid basis for denying the alien's motion to reopen would be moot if the Board were to conclude on remand that the alien's application for asylum had been frivolous. 516 F.3d at 780 n.3. Third, on March 27, 2008, the government filed a petition for panel rehearing in *Kalilu* with respect to the portion of the panel's opinion upon which petitioner relies, and that motion remains pending.

Finally, even if the Ninth Circuit denies the government's petition for rehearing in *Kalilu*, any conflict between that decision and the Eleventh Circuit's decision in this case may well be resolved by the regulatory process of which the Interim Rule is a part. The Interim Rule was issued in order to resolve a previous conflict among the courts of appeals regarding the ability of arriving aliens to apply for adjustment of status. See 71 Fed. Reg. at 27,587. The Attorney General and the Secretary have specifically requested public comment on "whether the regulations should be amended to provide additional regulatory guidance on when the immigration judges and the [Board] should exercise discretion to grant or deny a continuance for arriving aliens in removal proceedings who have filed an application for adjustment of status which remains pending with USCIS." *Id.* at 27,589. The Attorney General and the Secretary are best situated to address in the first instance peti-

tioner's contention that the BIA's refusal to grant a motion to reopen under the circumstances presented here threatens to "preclude[] otherwise eligible arriving aliens in removal proceedings from applying for adjustment of status," Pet. 8 (emphasis deleted), as well as to determine the most appropriate solution in the event that such a problem actually exists.

3. In any event, this case would be a poor vehicle for considering the narrow question upon which petitioner seeks review.

Although the matter does not appear to have been brought to the Board's attention, it appears that the BIA would have lacked authority to grant petitioner's motion to reopen as of the date of its July 26, 2006, decision on remand. Section 1003.2(d) of Title 8 of the Code of Federal Regulations provides that "[a]ny departure from the United States, *including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings*, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion." (emphasis added). As noted above, petitioner was removed to Germany in November 2005, which was *before* the Board's July 26, 2006, decision that denied petitioner's motion to reopen and that is the subject of the current petition for review.[9]

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[9] Indeed, petitioner was removed to Germany before the court of appeals rendered its first decision in this case on April 13, 2006, which reversed the Board's earlier denial of petitioner's motion to reopen on March 3, 2005, and remanded to the Board for further proceedings. See *Scheerer I*, 445 F.3d at 1322. Thus, by operation of the governing regulation, petitioner's motion to reopen had already been withdrawn before the court of appeals first considered the Board's denial of that motion, and it has remained withdrawn ever since.

In addition, petitioner has failed to show that this Court's review is necessary in order to permit him to obtain any concrete benefit. Petitioner has already been removed from the United States. As a result, there would be no way for him to realize the principal benefit of obtaining lawful permanent residence by way of adjustment of status, *i.e.*, the ability to do so *without* being required to depart from the United States and pursue lawful permanent resident status from abroad. See *Randall* v. *Meese*, 854 F.2d 472, 473-474 (D.C. Cir. 1988) (R.B. Ginsburg, J.), cert. denied, 491 U.S. 904 (1989). Adjustment of status, moreover, is a form of relief that cannot be pursued from outside the United States, see 8 U.S.C. 1255(a), 8 C.F.R. 245.1(a), and petitioner's present incarceration in Germany (see note 3, *supra*) would prevent him from traveling to the United States at this point in any event.

Once petitioner is released, moreover, he will have avenues for seeking lawful permanent residence in the United States other than an application for adjustment of status. As noted earlier, see note 2, *supra*, petitioner is now the beneficiary of an approved I-130 immediate relative visa. Accordingly, upon his release from incarceration, petitioner will be eligible to seek an immigrant visa from an overseas consular officer. 8 U.S.C. 1151(b)(2)(A)(i), 1154(a)(1)(A)(i), 1201(g), 1202(a); 8 C.F.R. 204.1(e)(2) and (3). A consular officer who is presented with an approved petition for an immediate relative visa has no discretion to deny an immigrant visa to an alien who is not inadmissible under 8 U.S.C. 1182, see 8 U.S.C. 1201(g); 22 C.F.R. 42.31(a), and the denial of petitioner's motion to reopen his removal proceedings would have no prospective effect on his ability to obtain such a visa.

It is true that, as a result of having been removed from the United States, petitioner is now subject to a period of inadmissibility under 8 U.S.C. 1182(a)(9)(A)(i) and (ii). As the court of appeals emphasized, however, that period may be waived by the Secretary or his designee, USCIS, see 8 U.S.C. 1182(a)(9)(A)(iii), and DHS has indicated its "willing[ness] to entertain" such a request. Pet. App. 20a n.10. The granting of such a request would, of course, be committed to the sound discretion of certain government officials. The same thing, however, is true with respect to the two forms of relief that petitioner states that he prefers to pursue: a motion to reopen with the BIA, see *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2315 (2008), and a grant of adjustment of status by USCIS, see *Abudu*, 485 U.S. at 105; 71 Fed. Reg. at 27,588.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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